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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 968

MILTON BRADLEY COMPANY AND A. C. McCLURG & COMPANY,

Petitioners,

vs.

THE GELLES-WIDMER COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioners, Milton Bradley Company and A. C. McClurg & Company, respectfully pray for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled action on January 11, 1963. A timely petition for rehearing was denied on February 12, 1963. A motion for leave to file a second petition for rehearing was promptly made and was denied on February 21, 1963. The mandate of the court below has been stayed to April 3, 1963 to permit this petition.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported in 313 F. 2d 143, and is annexed to this petition as Appendix B. The oral decision of the District Court and subsequently entered findings of fact and conclusions of law are reported only in 132 U. S. P. Q. 30 and are annexed to this petition as Appendix D.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 11, 1963, and is annexed hereto as Appendix C.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTION PRESENTED.

May a court excuse compliance with the provisions of 17 U.S.C. §§ 10, 19 which require that every copy of a copyrighted work published or offered for sale shall bear a copyright notice in the name of the copyright proprietor and approve a copyright notice deliberately using the name of a non-proprietor (a) in the face of repeated refusals by Congress to change or even relax the statutory provisions and (b) in disregard of decisions of this Court and the courts of other circuits requiring strict compliance with these provisions?

STATUTES INVOLVED.

The pertinent provisions of the Copyright Law which are involved, *i.e.*, 17 U. S. C. §§ 10, 19, 21, are printed in Appendix A to this petition.

STATEMENT OF THE CASE.

Statutory History Relating to the Question Here Involved.—Ever since 1802[1] it has been a requirement of the United States Copyright Law that all published copies of the copyrighted work bear a prescribed notice of copyright. Failure to comply with the notice provisions of the statutes operated to prevent the right from coming into existence. Thus, prior to 1909[2] publication without the prescribed notice worked an abandonment of the right, and even after perfection of the copyright a single omission of the statutory notice resulted in a forfeiture. This concept of the essentiality of copyright notice and the concomitant limited latitude of the courts on notice questions were emphasized in a number of decisions of this Court.[3]

When the Copyright Law was revised in 1909, Congress, obviously mindful of this Court's strict constructions of the notice requirements of the existing law, saw fit to relax these requirements but only by including provisions which excused "omission by accident or mistake of the prescribed notice from a particular copy or copies."[4] This section[5] expressly declared that such a limited type of omission should not invalidate the copyright or prevent recovery against a person having actual notice of the copyright.[6]

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1. Act April 29, 1802, ch. 36, 2 Stat. 171.

2. Act March 4, 1909, ch. 320, 35 Stat. 1075.

3. *Thompson* v. *Hubbard*, 131 U. S. 123; *Higgins* v. *Keuffel*, 140 U. S. 428; *Holmes* v. *Hurst*, 174 U. S. 82; *Mifflin* v. *R. H. White Co.*, 190 U. S. 260; *Mifflin* v. *Dutton*, 190 U. S. 265; *DeJonge & Co.* v. *Breuker & Kessler Co.*, 235 U. S. 33.

4. Act March 4, 1909, ch. 320, § 20, 35 Stat. 1080.

5. When the Copyright Law was codified in 1947, § 20 was renumbered as § 21 of Title 17, U. S. C.

6. H. R. Rep. No. 2222, 60th Congress, 2d Session 13 (1909) indicates the underlying basis and reasons for this addition as follows:

"Section 20 makes a material change in existing law. Under

(footnote continued next page)

Since the Act of 1909, there have been numerous unsuccessful attempts to enact legislation which would either eliminate the essentiality of a copyright notice altogether or liberalize the provisions requiring the use of a proper copyright notice on each and every copy of the copyrighted work. A brief summary of some of these proposals is believed necessary to a proper understanding of the question presented by this petition.[7]

H. R. 12549 (71st Congress, 2d Session [1930]) provided (a) that copyright should be granted "without compliance with any conditions or formalities whatever" and (b) that all copyrighted works be freed from the requirement of a notice. This bill also would have validated copyrights lost under the earlier law because of a defective notice.[8] Section 17 of H. R. 10364 (72d Congress, 1st Session [1932]) concluded with the provision that "any form of notice is sufficient which reasonably informs anyone that copyright is

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existing law notice of copyright must be printed in every copy of every edition of a book. If any copy of any edition published by authority of the proprietor of the copyright by accident or mistake gets out without the copyright notice, the whole copyright is lost. More copyrights have been lost under this drastic provision of the law than in any other way. Your committee believe that an unintentional failure to comply with this requirement in the case of a single book ought not to have attached to it the penalty involved in the forfeiture of the copyright. . . ."

7. All of these proposals have been conveniently collected and discussed in *Copyright Law Revision* (1960), Study No. 7 (pp. 37-46) of Studies Prepared for the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, U. S. Senate, 86th Congress, 2d Session, pursuant to S. Res. 240.

8. Thus § 35 of the proposed legislation provided in part:

"In the event that prior to the passage of this Act notices of copyright were placed upon any works which were defective in form or did not contain the name of the person or persons actually entitled to copyright or contained an incorrect name . . . such notices . . . are hereby legalized, confirmed, made valid and effectual as fully as if none of the various errors, omissions, matters, and conditions . . . had occurred. . . ."

claimed in the work." The Duffy bills of 1935 (S. 2465, S. 3047, 74th Congress, 1st Session) provided for saving a copyright not only when there was an "omission by accident or mistake of the prescribed notice" but also when there was "any error as to the name of the copyright owner . . ." Between 1937 and 1941 various bills substantially incorporating the notice provisions of the Duffy bills were introduced in both houses of Congress.[9] All of these efforts ended in failure.

The last full-scale effort at reconsideration of the copyright notice requirements was the so-called "Shotwell Committee" bill (S. 3043, 76th Congress, 3d Session [1940]), which would have conferred copyright protection "without compliance with any conditions or formalities" and which would have restored (without prejudice to users who had already begun an undertaking) the copyright in works which had previously been published with defective notices. This bill, too, failed of enactment.

The Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law (July 1961)[10] recommends continuation of the requirement of a copyright notice in published copies, "but with certain changes in the present law to avoid the forfeiture of copyright through in-

9. H. R. 5275, 75th Congress, 1st Sess. (1937);
S. 2240, 75th Congress, 1st Sess. (1937);
H. R. 926, 76th Congress, 1st Sess. (1939);
H. R. 4871, 76th Congress, 1st Sess. (1939);
H. R. 6160, 76th Congress, 1st Sess. (1939);
H. R. 9703, 76th Congress, 3rd Sess. (1940);
H. R. 3997, 77th Congress, 1st Sess. (1941).

10. See House Committee Print, 87th Congress, 1st Session. This report was the culmination of a program of studies by the Copyright Office preparatory to a general revision of the copyright law. Thirty-four studies have been published in a series of twelve committee prints issued by the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary. Study No. 7 of the Third Committee Print relates to the notice question here involved.

advertent omission of or errors in the notice" (p. 63). Admitting that 17 U. S. C. § 21 has served a valuable purpose, the Register has proposed that these provisions be enlarged to cover inadvertent omission of the notice "from more than a few or from all of the copies . . ." (p. 64). The Register would not sanction a deliberate omission, however, and would save the copyright only when it is shown that the omission was inadvertent. The Register has also proposed that an erroneous name in a notice should not invalidate the copyright, with the proviso that any person "not actually informed otherwise" (p. 64) should be entitled to act on the assumption that the name in the notice is correct.

No legislation has as yet been proposed to carry out the recommendations of the Register of Copyrights and there have been no material changes in 17 U. S. C. §§ 10, 19, 21 since their enactment in 1909.

The Manner in Which the Notice Question Arises.— Petitioners were sued by respondent in the United States District Court for the Northern District of Illinois for alleged infringement of five copyrights relating to flash cards.[11] The basis for federal jurisdiction in the District Court in the first instance was 28 U. S. C. § 1338 (App. 5).[12]

Respondent published and commenced the sale of the copyrighted flash cards in the spring of 1958. These sets were designed to retail at $1.00 per set and were intended

11. Petitioners were also charged with unfair competition in Count II of the Complaint. This count as amended was dismissed by the District Court because the evidence failed to sustain the charges that petitioner or either of them, had competed unfairly with respondent or ha engaged in any unfair business practice. The Court of Appeals affirmed this ruling.

12. "App. . . ." denotes petitioners' Appendix in the Court of Appeals.

for distribution primarily through wholesale and retail channels; they were imprinted with this copyright notice: "The Gelles-Widmer Co., St. Louis, Mo. Copyright 1958."

In July 1958, respondent organized a Missouri corporation under the name of School Aids Products Co. to promote, sell and distribute a diminutive and less expensive version of the copyrighted flash card sets (App. 83, 85). While respondent and School Aids Products Co. have the same officers, employees, agents, directors and shareholders, School Aids Products Co., nevertheless, is *a distinct and separate legal entity*. It is not a subsidiary or other corporate affiliate of respondent, nor is it a licensee nor was there any agreement between the two corporations (App. 82-84). The organization of School Aids Products Co. was part of a deliberate and calculated effort by respondent to garner another segment of the trade, *i. e.*, the so-called syndicate market (App. 103) with a cheaper version of respondent's sets, without any intimation to the trade that respondent was in any way associated with the cheaper sets. During 1958, and at a time when the copyrighted works were being published with a notice of copyright in respondent's name, at least 15,722 sets of the copyrighted flash cards were sold (App. 166) with the following copyright notice: "School Aids Products Co., St. Louis 5, Mo., Copyright 1958." There was no showing nor was it claimed by respondent that this notice was the result of inadvertence, accident or mistake. Thus, simultaneously, large numbers of the copyrighted works were being published with notices in the names of two different copyright proprietors.

The Opinion of the Court Below Upon the Notice Question.—The court below refused to hold that the use of the name of School Aids Products Co. as the copyright proprietor in the copyright notices upon thousands of sets of the copyrighted works, when in fact respondent was the copyright proprietor, vitiated or even affected respondent's copyrights, *infra*, p. ix. Although 17 U. S. C. §§ 10 and 19, which require that each copy of a copyrighted work "published or offered for sale" shall bear a copyright notice "accompanied by the name of the copyright proprietor," were relied on by petitioners, the court paid no attention to the essentiality of a proper notice as demanded by these sections. Neither did the court find that the use of the false notice was inadvertent or occasioned by accident or mistake within the meaning of 17 U. S. C. § 21.

On the contrary, the court below held that this false notice was a proper one because (a) the interests of the two corporations were precisely the same and (b) petitioners were in no way prejudiced by any reliance on the notice on the small sets. Without discussing or even acknowledging this Court's decisions in *Thompson* v. *Hubbard*, 131 U. S. 123, *Mifflin* v. *R. H. White Co.*, 190 U. S. 260, *Mifflin* v. *Dutton*, 190 U. S. 265, and *DeJonge & Co.* v. *Breuker & Kessler Co.*, 235 U. S. 33, which were strenuously urged upon it by petitioners, the court below ruled that the question is governed by *National Comics Publications, Inc.* v. *Fawcett Publications, Inc.*, 191 F. 2d 594 (2 Cir. 1951), because it was there said (p. 602):

> ". . . Since, however, the interests of the two corporations were precisely the same, we think that a notice was sufficient which used the dummy's name as 'proprietor.' "[13]

13. The pertinent portions of the decision of the Court of Appeals for the Second Circuit in *National Comics* are annexed to this petition as Appendix E, *infra*, p. xxix.

REASONS FOR GRANTING THE WRIT.

(1) The Decision of the Court Below Is in Conflict With Decisions of This Court and Invades Rights Vested Only in Congress.—The decision of the Court of Appeals in the instant case and that of the Court of Appeals for the Second Circuit in *National Comics Publications, Inc.* v. *Fawcett Publications, Inc.*, 191 F. 2d 594 (2 Cir. 1951), on the authority of which the instant case was decided, are directly in conflict with the decisions of this Court in *Thompson* v. *Hubbard*, 131 U. S. 123, 149-51, *Mifflin* v. *R. H. White Co.*, 190 U. S. 260, 264, *Mifflin* v. *Dutton*, 190 U. S. 265 and *DeJonge & Co.* v. *Breuker & Kessler Co.*, 235 U. S. 33, 36.

In *National Comics*, which the court below preferred to the decisions of this Court, Judge Learned Hand, 191 F. 2d 600 conceded that 17 U. S. C. § 10 implies that failure to affix the notice upon each copy will forfeit the copyright and, citing *Mifflin* v. *Dutton* and *DeJonge*, he said that "such is the law." However, on the question as to how far the notices must "exactly conform" to 17 U. S. C. § 19, he insisted on the right to allow a latitude to the notice and held (*infra*, p. xxix) that "any notice is sufficient which gives the substance of what is prescribed in § 19." In this respect his reasoning was directly contrary to *Mifflin* v. *White*.[14] It was also out of harmony with *DeJonge*, where Mr. Justice Holmes held that it is not "overtechnical" to insist on the literalism of the notice requirements of the statute and that it is not for the courts to say that something less will serve (235 U. S. 36).

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14. Judge Hand thus effectively amended the notice provisions of the statute by introducing substantially the same language proposed in § 17 of H. R. 10364 (72d Congress, 1st Session [1932]). See *ante*, p. 4.

Judge Hand's decision has been discussed by certain commentators[15] but, significantly, none of them has attempted to reconcile that decision with this Court's decisions or to consider its weight and soundness in the light of the numerous unsuccessful attempts in Congress to change the statutory law. On the other hand, at least one noted copyright authority[16] has conceded, if only by implication, that if any change in the statutory requirements of a notice is to be made, it should be made by Congress by reconsideration of the unsuccessful Vestal and Thomas [Shotwell Committee] bills[17] and not by a court of inferior jurisdiction.

We submit that there are no compelling considerations which justify reading into 17 U. S. C. §§ 10, 19 a construction at variance with the explicit words of the statute. The decisions of this Court are clear; the statutory provisions are hardly ambiguous; and the Congressional purpose and policy remain unchanged.

(a) The Instant Factual Situation Is Controlled by Mifflin v. Dutton.—The facts in the instant case do not parallel those in *National Comics* where there was no simultaneous publication of the same copyrighted work with different names shown in the copyright notice as the copyright proprietor and where the copyright was actually perfected in

15. Halliday, Losing Copyrights under the Law of the United States, 35 J. Pat. Off. Soc'y, pp. 343, 349, 359-61 (1953); Melville, Copyright Notice in the Light of Recent Decisions, 30 U. of Cin. L. Rev., pp. 487, 493 (1961); Neff, Copyright Notice Requirements —Pitfalls for the Unwary, 59 Mich. L. Rev., pp. 616, 618 (1961).

16. Finkelstein, The Copyright Law—A Reappraisal, 104 U. Pa. L. Rev., pp. 1054-56 (1956).

17. H. R. 12549, 71st Congress, 2d Session (1930); S. 3043, 76th Congress, 3rd Session (1940).

the name of the dummy corporation.[18] Rather, the facts here are practically the same as those in *Mifflin* v. *Dutton*. The specific question in the latter case was whether the copyright upon thirteen chapters of Harriet Beecher Stowe's *The Minister's Wooing*, which first appeared in a book copyrighted by her on October 15, 1859, were vitiated by their subsequent appearance in the *Atlantic Monthly* under a copyright notice in the name of Ticknor & Fields. It was held that Mrs. Stowe's copyright and that of Oliver Wendell Holmes involved in *Mifflin* v. *White*[19] were invalid, the court saying (190 U. S. 266):

> "It is exceedingly unfortunate that, with the pains taken by the authors of these works to protect themselves against republication, they should have failed in accomplishing their object; but the right being purely statutory, we see no escape from the conclusion that, unless the substance as well as the form of the statute be disregarded, the right has been lost in both of these cases."

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18. In the instant case School Aids Products Co. is in no way a "dummy" corporation of respondent. It is clearly a separate legal entity. The lower court's determination that the present situation is governed by *National Comics* not only fails to recognize that the factual situations existent here and in that case are vastly different, but also ignores the settled principle adhered to by this Court in *Schenley Distillers Corp.* v. *United States*, 326 U. S. 432, 437, that corporate entities may not be disregarded where those in control have "deliberately adopted the corporate form in order to secure its advantages." The lower court's ruling also is in direct conflict with the decision in *Public Ledger Co.* v. *Post Printing & Publishing Co.*, 294 Fed. 430 (8 Cir. 1923), where it was held that a corporation and its stockholders are different entities insofar as compliance with the statutory notice requirements is concerned.

19. Whereas Mrs. Stowe published her book and perfected her copyright before all of the chapters had been serialized, Dr. Holmes did not publish his book and perfect his copyright until all of the parts of *The Professor at the Breakfast Table* had been published in serial form. The last two parts, however, were under the Ticknor & Fields copyright notice, and it was contended in *Mifflin* v. *White* that this saved the Holmes copyright.

(b) The Statutory Notice Requirements Are Not Merely Secondary or Formal Matters.—There is no basis whatever, either in the light of this Court's decisions or in view of the legislative history, for treating the notice requirements of the present statute as merely formal or secondary matters.

This Court has never modified any of its decisions on the essentiality of the prescribed notice. Nor has Congress seen fit to disturb the essentiality concept or to relax the requirements that all published copies bear the prescribed notice accompanied by the name of the copyright proprietor, except as it has saved validity in cases where the notice is omitted "by accident or mistake" from a limited number of copies (17 U. S. C. § 21).

It is extremely significant that when the various unsuccessful proposals to change the existing law, including the Duffy bills,[20] were considered, it was always recognized that, copyright being "purely statutory" as this Court has said, only Congress has the power to change the law.[21]

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20. The Duffy bills (*ante*, p. 5) took their name from their sponsor, F. Ryan Duffy, then senator from Wisconsin and now the member of the court below who wrote the opinion in this case. While, of course, this is mere happenstance, nonetheless the nonenactment of the Duffy bills and the decision of the court below combine to dramatize the question raised by the instant petition in this symbolic form: May Judge Duffy achieve by judicial construction that which Senator Duffy was unable to accomplish by legislative amendment?

21. This Court has often disapproved attempts by lower federal courts to legislate judicially in an attempt to circumvent the unequivocal language of a statute particularly when Congress has not seen fit to sanction a change in the statute. In *Southern Steamship Co. v. National Labor Relations Board*, 316 U. S. 31, this Court, after noting that several bills had been unsuccessfully introduced to limit the scope of the statutes there involved, stated (page 44):

> "... *When the legislative purpose is so plain, we cannot assume to do that which Congress has refused to do.*" (Emphasis added.)

It is further not without importance that many of the proposals recognized that 17 U. S. C. § 21 does not cover the deliberate use in a copyright notice, on more than a few copies of a copyrighted work, of the name of a person or company, not *the* actual copyright proprietor. And, finally, the present state of the law is explicitly recognized by the proposal of the Register of Copyrights that Congress change the law so that the inadvertent use of an erroneous name in a copyright notice would not have any invalidating effect.

We submit that it was clearly erroneous in the foregoing circumstances for the court below to substitute its judgment for that of Congress and to hold that something less than that required by Congress to maintain a wholly statutory right will serve.

(c) Actual Notice of the Copyright Does Not Excuse Compliance With the Statutory Requirements.—The court below rested its decision on the fact that one of the petitioners had actual notice of the copyrights and that petitioners were in no way prejudiced by the improper copyright notice affixed to the sets sold by School Aids Products Co. The court below has thus made compliance with the demands of the statute turn, not on that which is required from the seeker of the monopoly but, rather, on the knowledge and conduct of some other person. This is not only an erroneous conception of the rules of statutory construction, but it is also a view of the requirements of the Copyright Law which is directly contrary to this Court's decisions.

In *Thompson* v. *Hubbard*, Thompson had actual notice of the copyright; indeed, he was the former owner of the copyright. But, because Hubbard's notices did not meet the demands of the statute, the copyright was invalidated,

and this Court refused to let it stand—valid against Thompson and invalid against the rest of the world (131 U. S. 151). In *Mifflin* v. *White*, this Court said (190 U. S. 264):

> ". . . It is incorrect to say that any form of notice is good which calls attention to the person of whom inquiry can be made and information obtained, since the right being purely statutory, the public may justly demand that the person claiming a monopoly of publication shall pursue, in substance at least, the statutory method of securing it."

The court below has accordingly invoked a test at variance with the clear language of the statutes and not recognized by this Court when it made the propriety or validity of the notice depend upon something other than strict compliance on respondent's part. *Mifflin* v. *White* expressly holds that the courts are not "bound to look beyond the face of the notice" and determine whether "it is reasonable to suppose an intelligent person could actually have been misled" (190 U. S. 264).

The privilege of copyright protection is by the very words of 17 U. S. C. § 1 granted only to those "complying with the provisions of this title." This makes clear a Congressional intent to place the onus of compliance upon those seeking the copyright monopoly. Only compelling language excusing compliance elsewhere in the Copyright Law could justify making knowledge and conduct of others a substitute for compliance by the putative monopolist. No such language can be found.

(2) There Is a Conflict Among the Circuits as to the Necessity of Strict Compliance With the Statutory Notice Requirements.—The decision of the court below and that in *National Comics*, on the authority of which the instant case was decided, are in conflict with the decisions of the First,

Fourth, and Eighth Circuits in *Egner* v. *E. C. Schirmer Music Co.*, 139 F. 2d 399 (1 Cir. 1943), *Deward & Rich, Inc.* v. *Bristol Savings & Loan Corp.*, 120 F. 2d 537 (4 Cir. 1941), *Advertisers Exchange, Inc.* v. *Anderson*, 144 F. 2d 907 (8 Cir. 1944), and *Booth* v. *Haggard et al.*, 184 F. 2d 470 (8 Cir. 1950). All of these cases involved the same general issue, *i.e.*, how exactly must the copyright notice conform to the requirements of the statute. In the Second and Seventh Circuits the copyright notice requirement has been treated as a merely formal or secondary matter. In the First, Fourth, and Eighth Circuits, on the other hand, the copyright notice and strict compliance with the statutory requirements are considered the *sine qua non* of the right.

The conflict stems from a basic philosophical difference in approach taken by the circuits.[22] Thus, in *National Comics*, Judge Hand held that it would be absurd to deny the courts the latitude which he said was available to them prior to 1909, and he expressly criticized the decisions in the Fourth and Eighth Circuits as being out of harmony with the doctrine which he found in the law, *infra*, p. xxix. In the Second and Seventh Circuits, monopoly privileges are thus being granted to those who fail to comply with the provisions of the statute, whereas it is the settled law of this Court and in at least three other circuits that protection under the Copyright Law may be accorded only to those who fully comply with the statutory provisions.

Not only is it particularly inappropriate for the Second and Seventh Circuits to ignore this Court's decisions—but also there now exists a definite lack of uniformity in

22. At least one of the members of the Court of Appeals for the Second Circuit is unwilling to join in the move against the "relentless literalism" of the present law; see the dissenting opinions of Judge Friendly in *Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 274 F. 2d 487 (2 Cir. 1960), and *H. M. Kolbe Co.* v. *Armgus Textile Co.*, 279 F. 2d 555 (2 Cir. 1960).

the administration of the Copyright Law which requires intervention by this Court. The importance of the decision of the court below and the urgency that it be reviewed by this Court are magnified by the fact that the Second and Seventh Circuits embrace such large metropolitan areas as New York, Chicago, Indianapolis, and Milwaukee. If the instant petition for certiorari is denied, it is not unlikely that the erroneous view of the court below which sanctions an admitted and flagrant disregard of a vital requirement of the statute for financial gain will become the last word on this subject and will be applied in the many actions normally brought in the cities above mentioned.

In view of *Mazer* v. *Stein*, 347 U. S. 201, it is also important that this Court resolve the conflict among the circuits as to how far the copyright notice must exactly conform to the requirements of the statute. Under the rule of that case, protection of industrial designs may now be secured under the copyright law without any examination as to novelty or inventiveness for a period as long as 56 years.[23] Considering the fact that manufacture and sale of "works of art" as useful articles can and will be conducted by the copyright proprietor or its licensees and subsidiaries, the pressing issue is whether any form of notice on the article will do.

The question resolves itself to this—May the proprietor and a licensee and his related or subsidiary company use

23. In his Report on the General Revision of the U. S. Copyright Law (July 1961), the Register of Copyrights stated (p. 12) that since the *Mazer* decision in 1954 the Copyright Office has registered a rapidly increasing number of claims in the "works of art" category which include such articles as fabrics, jewelry, lace, glassware, silverware, etc. The Register's Annual Reports confirm this observation, for they show that in the category "works of art, models, or designs" the number of registrations has increased 78% from 3,170 in 1954 to 5,557 in 1961, while the number of articles deposited has increased 110% from 4,574 to 9,599 in the same period.

their respective names as copyright proprietor of a single copyright merely because of their relationship?

May they by this contrivance conceal their association with each other and probe for different economic markets by a deliberate disregard of the notice requirements of the copyright law—a single copyright proprietor for a single copyright?

Should not a copyright proprietor who has deliberately disregarded and misused the provisions of Sections 10 and 19 of the Copyright Law be denied the exclusive right given by Section 1, which is expressly conditioned "upon complying with the provisions" of that law?

CONCLUSION.

The question raised by this petition is of public and far-reaching importance and is one of substance. There is confusion in the administration of the Copyright Law on which the circuits are at present in conflict and hopelessly divided. In the instant case the Seventh Circuit has joined the Second Circuit in substituting a court's judgment for that of Congress and in disregard and direct conflict with this Court's opinions and those in other circuits. The confusion and conflict should be resolved.

Respectfully submitted,

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Appendices

APPENDIX A.

Statutes Involved.

(17 U.S.C. Sec. 10.)

§ 10. PUBLICATION OF WORK WITH NOTICE.—Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title.

(17 U.S.C. Sec. 19.)

§ 19. NOTICE; FORM.—The notice of copyright required by section 10 of this title shall consist either of the word "Copyright," the abbreviation "Copr.", or the symbol "©," accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section 5 of this title, the notice may consist of the letter C enclosed within a circle, thus ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: *Provided*, That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright was subsisting on July 1, 1909, the notice of copyright may be either in one of the forms prescribed

herein or may consist of the following words: "Entered according to Act of Congress, in the year , by A. B., in the office of the Librarian of Congress, at Washington, D. C.," or, at his option, the word "Copyright", together with the year the copyright was entered and the name of the party by whom it was taken out; thus, "Copyright, 19—, by A. B."

(17 U.S.C. Sec. 21.)

§ 21. SAME; EFFECT OF ACCIDENTAL OMISSION FROM COPY OR COPIES.—Where the copyright proprietor has sought to comply with the provisions of this title with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 13656-7 SEPTEMBER TERM AND SESSION 1962

THE GELLES-WIDMER COMPANY, *Plaintiff-Appellee,*
No. 13656 v.
MILTON BRADLEY COMPANY and A. C. McCLURG & COMPANY, *Defendants-Appellants.*

THE GELLES-WIDMER COMPANY, *Plaintiff-Appellant,*
No. 13657 v.
MILTON BRADLEY COMPANY and A. C. McCLURG & COMPANY, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 11, 1963

Before DUFFY, SCHNACKENBERG and KILEY, *Circuit Judges.*

DUFFY, *Circuit Judge.* Plaintiff sues for infringement of five copyrights for educational type flash cards and also for unfair competition. The District Court upheld the validity of the copyrights and held that defendants had infringed same. The Court denied plaintiff's claim of unfair competition.

Defendants have appealed from that part of the judgment relating to validity of the copyrights. Plaintiff has appealed from that part of the judgment adverse to it on the question of unfair competition.

Five copyrights, all relating to flash cards, are in suit; four of them deal with the four arithmetical subjects, i.e., addition, subtraction, multiplication and division. The fifth relates to the twenty-six letters of the alphabet.

Plaintiff, whose principal place of business is in St. Louis, Missouri, was organized in 1955. Since that date, it has been engaged in the production and marketing of educational games and materials designed and marketed for the use of school children in the home and in the school.

Defendant, Milton Bradley Company, a Massachusetts corporation, was organized in 1860. For more than a century it has been engaged in the production and marketing of an extensive line of educational materials and children's games for use in the home and in the schools.

Defendant, A. C. McClurg & Company, is an Illinois corporation. It has long been a wholesale distributor to retail stores of children's games and children's activity materials. It has been a distributor for Milton Bradley Company since 1918. The only relationship between the two companies is that of buyer and seller.

The term "flash card" is derived from the manner in which the cards are used. In actual practice, a single card is usually flashed before a child's eyes. A flash card has been defined[1] as "A card bearing words, numbers, or pictures, to be shown in school drills to stimulate observation, or as an aid in teaching reading, arithmetic. . . ." Flash cards have been used in the standardized manner in the home and in the school, and in playing games for more than half a century.

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1. Webster's New International Dictionary, 2nd Edition.

The basic number combinations imprinted on all arithmetical cards are standard. There is shown combinations of the numbers 0 to 9. Insofar as addition, subtraction and multiplication are concerned, there are only 100 ways in which these numbers can be combined. Only 81 number combinations are possible in division, since there can be no division by zero.

Initially, plaintiff marketed a line of educational materials known as the Dolch games.[2] These were distributed to schools and teachers. Plaintiff then selected certain of its units and by revision and providing proper instructions for parents, it was able to sell these materials in the retail market. A second distribution channel utilized by plaintiff was wholesale toy outlets.

After plaintiff had developed its retail market for the Dolch educational type materials during 1955 and 1956, defendant Milton Bradley took note of the new market outlet as is shown by its bulletin dated January 14, 1957, to its branch managers, educational salesmen and game salesmen. It directed its educational salesmen to call on department and book stores so that they might obtain their share of this "new and potentially greater share for our educational teaching aids."

For many years, Milton Bradley had marketed a certain type of flash card. So had others in the school supply industry. However, the toy and game industry had never included a flash card classification. Due in part, at least, to plaintiff's extensive promotion, in 1959 the toy industry, for the first time, classified "flash cards" as an individual toy item.

In 1957, plaintiff originated and developed the several educational works which are the subject of the five copyrights here in suit. These sets were designed for use of

2. These were reading and arithmetic materials created and named for Professor E. W. Dolch of the University of Illinois.

children in the home as an aid in learning addition, subtraction, multiplication, division and the alphabet.

In addition to the flash cards per se, containing the arithmetic fact problems, plaintiff drafted testing sheets which could be used for determining the development and progress the child was making. It also drafted explanations and instructions for the child and the parent, explaining the proper use of both the flash cards and the progress testing sheets.

In March 1958, plaintiff added two new series of flash cards to its Dolch line. Plaintiff undertook an extensive promotional campaign. In the first fifteen months' period, approximately one million sets of the new flash cards were sold.

The trial in the District Court extended over two weeks. Eight witnesses testified before the Court and others by deposition. Each party introduced over one hundred physical and documentary exhibits. After the filing of briefs and full oral argument, the trial court entered detailed findings of fact and conclusions of law.

A very brief summary of such findings is, plaintiff was the author of the copyrighted educational works comprising the five individual sets of flash cards; plaintiff's educational works comprise copyrightable subject matter; defendant Bradley infringed plaintiff's copyrights by photographing plaintiff's card sets, by copying and adapting plaintiff's sequence arrangements and by substantially plagiarizing plaintiff's instructions and directions, and that defendant's copying and plagiarizing was wilful and deliberate.

Defendant Milton Bradley's vice president, Taft, was in charge of research and development for that company. He designed the original "double value" flash cards in 1953, and redesigned same in 1957. By March 1959 Taft had photographed each of plaintiff's copyrighted sets. He

photographically reduced the test sheets and copied and adopted the problem numbers and sequence arrangement of the cards in plaintiff's copyrighted sets. There was a substantial copying of the instructions contained in plaintiff's sets. It should be noted that Taft did not follow any of Milton Bradley's material nor use any common source material.

The only explanation by Taft for such procedure was that he was in a hurry to get out the new sets which were to sell for one dollar each for the Toy Fair held in March 1959, and that the kind of numbers he desired to use was not available.

Taft admittedly saw the copyright notice on the boxes containing plaintiff's flash cards. Defendants' counsel argues that Taft did not think he was doing anything wrong because, in 1957, he had submitted Milton Bradley "double value" flash cards for registration and was turned down by the Copyright Office on the ground such cards contained no copyrightable subject matter.

This is a rather lame excuse. Taft testified his company automatically applied for copyright registration on every new item put into their lines. However, Taft did not submit the whole sets but merely the cover labels and the printers' sheets. Thus, the reply from the Copyright Office had no bearing on the copyrightability of plaintiff's sets which were submitted as complete units.

Defendants strongly urge that plaintiff's copyrights are invalid because they lack the creativity and originality required by the Constitution and the Copyright law. Their arguments for testing the validity of a copyright come close to judging copyrighted works by patent standards.

In *Wihtol* v. *Wells*, 231 F. 2d 550, this Court stated at page 553: "The language in some court opinions seems to confuse the law of copyrights with that of patents. The Constitution itself differentiates between 'authors' and

their 'writings' from 'inventors' and their 'discoveries.' A copyright protects an original work and is not dependent upon novelty . . . 'It is clear, then, that nothing in the Constitution commands that copyrighted matter be strikingly unique or novel. Accordingly, we were not ignoring the Constitution when we stated that a "copy of something in the public domain" will support a copyright if it is a "distinguishable variation." . . . '"

In the same case we further quoted, page 553: " 'Accordingly, the Constitution, as so interpreted, recognizes that the standards for patents and copyrights are basically different.' " We also quoted with approval, page 553: " 'Originality in this context "means little more than a prohibition of actual copying." No matter how poor artistically the "author's" addition, it is enough if it be his own.' . . . 'Since a copyright is intended to protect authorship, the essence of copyright protection is the protection of originality rather than novelty or invention.' "

Defendants urge no one can obtain copyright protection on the basic arithmetical combinations used in any of the sets. We do not understand the plaintiff to make any such claim. What the District Court found to be infringed was the selection, arrangements and combinations contained in plaintiff's copyrighted sets. These were more than mere compilations. We agree with plaintiff that these combinations of problems selected as they were, together with the test sheets and the instructions, were more analogous to an educational book. The commercial success of plaintiff's flash card sets does indicate they were new and useful.

Plaintiff agrees that the basic materials and arithmetical problems may have been old and in the public domain, but we agree with plaintiff's argument that the arrangement, the plan and the manner in which they were put together by the author, does constitute originality.

On the question of validity of plaintiff's copyrights, defendants make some point that the function of plaintiff's cards is solely utilitarian since they were designed specifically for use by children in the home as educational aids. This argument has no validity especially since the decision of the Supreme Court in *Mazer* v. *Stein*, 347 U. S. 201.

Defendants urge the copyrights in suit are invalid because plaintiff permitted the use of an improper copyright notice by School Aid Products Company on a small set of flash cards directed through another market distribution. The District Court found that School Aid Products Company had the same officers, employees, agents, directors and shareholders, whose respective interests are the same as those of the officers, employees, agents, directors and shareholders of plaintiff.

The interests of the two companies were precisely the same. Defendants were in no way prejudiced by any reliance on the notice on the small sets. Taft admitted that during his year of development and research resulting in the infringing sets, he had before him the plaintiff's cards which contained a proper notice. This same defense was raised by the defendant in *National Comics Publications, Inc.* v. *Fawcett Publications, Inc.* 2 Cir., 191 F. 2d 594. There, the notice of copyright gave the corporation "Superman, Inc." as the name of the proprietor instead of "Detective", the proprietor in fact. The Court, by Judge Learned Hand, rejected the defense, pointing out that the two corporations had the same officers, directors and shareholders. The court said, at page 602: "Since, however, the interests of the two corporations were precisely the same, we think that a notice was sufficient which used the dummy's name as 'proprietor.'"

We hold, under the circumstances of this case, the use of the notice of the copyright by School Aid Products Company did not invalidate plaintiff's copyrights.

The findings of fact by the trial court upon which were based the conclusions that plaintiff's copyrights were valid, find ample support in the record before us. For the reasons hereinbefore discussed, we hold that the copyrights owned by plaintiff and here in question were valid and infringed.

There remains the question of unfair competition as alleged by plaintiff in Count 2 of its complaint. The District Court held that plaintiff did not meet the burden which was upon it on this issue, and that the evidence failed to prove likelihood of confusion or fraud or misrepresentation as to source.

We think it suffices to say that we find ourselves in agreement with the trial court on this issue.

The judgment of the District Court is

AFFIRMED.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Friday, January 11, 1963.

Before:
Hon. F. Ryan Duffy, Circuit Judge,
Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge.

THE GELLES-WIDMER COMPANY, *Plaintiff-Appellee*, vs. MILTON BRADLEY COMPANY and A. C. McCLURG & COMPANY, *Defendants-Appellants*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 13656

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX D.

Oral Opinion and Findings of Fact and Conclusions of Law of District Court.

DECISION.

The Court: Well, gentlemen, after what I consider much labor and such little thought as I was able to give a case, I have reached conclusions, and if you will just be seated, I will read them more at length.

This is the case of *Gelles-Widmer Company, plaintiff*, v. *Milton Bradley Company* and *A. C. McClurg & Company, defendants*, Civil Action No. 59 C 1180.

This is a case in which equitable relief is sought by reason of the alleged infringement of certain copyrights and alleged unfair competition.

I have read the pleadings as amended, and studied the transcript, examined and compared the exhibits, reviewed the opening statements of counsel, and I do want to compliment both of you on making very excellent opening statements which were very helpful to me.

I have read the transcript of the oral argument, the authorities, re-read your trial briefs, examined your manuscripts filed after trial was over, and I have reached conclusions that enabled me to decide the case to my own satisfaction, at least.

Being without a secretary I will dictate to the reporter a very brief memorandum of conclusions which should be ample to advise counsel of the findings, conclusions, and thinking of the Court, in view of the evidence, such as will enable you to prepare proposed findings and conclusions in compliance with the Rules of Civil Procedure.

This action arises under the Act of June 25, 1948, Chapter 646, 62 Stat. 931, U. S. Code, Title 28, Section 1338.

There was no dispute, as far as I know, about the jurisdiction. The parties, plaintiff and defendant, are found to be as set out in the complaint, except that the registered agent of Milton Bradley is not George Janus but George Nunn. I believe that was stated in your answer, Mr. Aller, 311 South Wabash, Chicago, Illinois.

On the first count of the complaint as amended, it claims copyrights and charges copyright infringements as set forth therein.

The plaintiff is entitled to the decision and judgment of the Court and to the relief for which it prays.

There will be no effort in this memorandum to set forth the findings, except to say that in the judgment of the Court the evidence fully sustains each and every material allegation of the first count in the amended complaint, regardless of whether the allegation is one of fact or a conclusion of fact, or a conclusion of law.

The plaintiff is entitled to a permanent injunction as prayed, to an accounting of profits of the defendant growing out of the infringements, pursuant to the statute and to damages caused by such infringement.

Counsel for the plaintiff is directed to prepare proposed findings of fact and pursuant to the evidence relevant to the decision; also to prepare proposed conclusions of law and suggested decree, and to present same to the Court after notice to opposing counsel.

The findings and conclusions, of course, need not be confined to the limits of this brief memorandum, but should be full and complete so as to cover the issues and the evidence thereon.

The affirmative defenses set forth in defendants' answer and the defendants' counterclaim are not sustained by

the evidence or by the law as applied to the evidence and the counterclaim is dismissed.

The second count of the amended complaint charges defendants with unfair competition and business practices.

The defendants are entitled to the decision and judgment of the Court on the second count. A careful study of the proof and the applicable law convinces me that a case is not made out against either defendant under said second count.

Wherefore, the second count of the complaint as amended, is dismissed for lack of sufficient proof, since the evidence failed adequately to prove confusion or likelihood of confusion, fraud or misrepresentation as to source or conspiracy to usurp plaintiff's market.

The wrong committed by the defendant was the copying and infringement of the plaintiff's copyrighted products and the use of its own good will, founded on a long history of dependable service to its customers, also business associates, and friendships built up over the years, constituting it a powerful competitor, to induce the wholesalers in particular to accept its new and infringing products, which had been copied after plaintiff's products, which were covered by valid copyrights.

This was not unfair competition, as set out in the second count.

It is my conclusion that the plaintiff has but one sustainable claim or cause of action, and that is the claim or cause of action set forth in the first count of the amended complaint, based upon defendants' infringement of plaintiff's copyright, which the Court finds to be valid and infringed, and based also upon defendants' sale, advertising, and merchandising of the infringing products.

Plaintiff is entitled to recover costs and reasonable

attorneys' fees which may be attributed to the first count of the amended complaint; the cost attributable to the second count to be assessed against the plaintiff.

Counsel for defendants may prepare findings and conclusions and order of dismissal on the second count.

This is a statement of my conception of the actionable wrong that has been done the plaintiff and the cause of action which arises from that wrong. I am quite convinced that under the decisions which were supplied to me, unfair competition in addition to infringement and the remedies provided therefor is not shown by the evidence.

Gentlemen, that is all I have to say to you.

* * * * *

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—59-C-1180) * *

WHAM, J.

After due consideration of the extensive testimony, careful examination of the exhibits, and study of the law, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT.

1. Plaintiff, Gelles-Widmer Company, is a corporation of the State of Missouri, located and having its principal office and place of business at 8988 Manchester Avenue, City of Brentwood, County of St. Louis, Missouri.

2. Defendant Milton Bradley Company is a corporation of the State of Massachusetts and is licensed to do business and is doing business in the State of Illinois, its registered agent for service of process being George Nunn, 811 Wabash Avenue, Chicago 5, Illinois.

3. Defendant A. C. McClurg & Company is a corporation of the State of Illinois, with its principal place of business at 333 East Ontario Street, Chicago 11, Illinois.

4. Plaintiff is presently, and since 1955 has been, engaged in the production, advertising and marketing of educational games and materials designed and marketed for use by school children in the home, and sold primarily through wholesale and retail channels to parents of school children.

5. Defendant Milton Bradley Company has since long prior to 1959 been engaged in the production, advertising and marketing of an extensive line of children's games and children's activity materials for use in the home. Milton Bradley Company has and is presently also engaged in the production, advertising and marketing of educational materials designed for use by school teachers and sold primarily to schools and to teachers for use in schools.

6. Defendant A. C. McClurg & Company is, and long has been, engaged as a wholesale distributor to retail stores of children's games and children's activity materials, including said games and materials produced and marketed by defendant Milton Bradley Company; from April 1958 to April 1959 defendant A. C. McClurg also distributed plaintiff's copyrighted flash card sets in substantial quantities.

7. Prior to March 11, 1958, plaintiff, at great expense to itself, originated and was the author of several educational works, identified in the record as plaintiff's exhibits 2, 5, 8, 11 and 14, designed specifically for use by children in the home to aid in their learning the basic arithmetical skills of addition, subtraction, multiplication, and division, and the alphabet.

8. The aforesaid educational works originated by plaintiff prior to March 11, 1958, consist primarily of element-

ary educational fact problems collected and arranged singularly on the front and reverse sides of a multiplicity of flash cards, together with progress testing sheets for use in measuring the educational development of the child and explanations and instructions to the child and parent as to the proper use and enjoyment of the flash cards and progress testing sheets.

9. Each of such educational works contains a set of flash cards directed to a separate educational subject, numbered and arranged in a specific sequence within the set to indicate degrees of difficulty, together with explanations, instructions, and progress testing sheets designed, respectively, for such separate educational subjects.

10. These flash card sets, including the explanations, instructions and progress testing sheets, contain material wholly original with plaintiff in expression, style, arrangement, sequence and plan of compilation; said flash card sets are the original work product of plaintiff, having been designed, written, prepared and created wholly by employees of plaintiff.

11. Between March 11, 1958, and June 12, 1959, plaintiff complied in all respects with the Act of July 30, 1947, Ch. 391, 61 Stat. 652, U. S. C. Title 17, and all other laws governing copyrights, and, by publication of said educational works with proper notice of plaintiff's copyright affixed to each copy thereof, secured the exclusive rights and privileges in and to the copyrights of said educational works.

12. In 1959, plaintiff deposited two copies of each of said educational works with the Register of Copyrights in accordance with the laws relating to copyrights, and subsequently certificates of registration were issued to plaintiff, said certificates being dated and identified as follows:

Number, Title and Date Received in Copyright Office

A-375788—"Addition Flash Cards: Learn the Play-Way"—February 9, 1959.

A-383869—"Subtraction Flash Cards: Learn the Play-Way"—March 16, 1959.

A-383868—"Multiplication Flash Cards: Learn the Play-Way"—March 16, 1959.

A-383870—"Division Flash Cards: Learn the Play-Way"—March 16, 1959.

A-393636—"Alphabet Flash Cards: Learn the Play-Way"—June 12, 1959.

13. Plaintiff's copyrights, heretofore identified, are each a Class "A" registration and, accordingly, each covers the complete subject set including test sheets, instruction sheets, cards, the style, arrangement, sequence, plan of compilation, the wording, numbering and sequence of words and numbers and combinations thereof, and the combination of each and every one of the above-mentioned items to each other.

14. School Aid Products Co. is a Missouri corporation having the same officers, employees, agents, directors, shareholders whose respective interests are the same as the officers, employees, agents, directors, shareholders of the Gelles-Widmer Company.

15. School Aid Products Co. was organized in July 1958 to promote and sell a diminutive size version of plaintiff's flash card sets to chain stores and syndicates or a low price market. Such sets of flash card sets are exemplified by defendants' exhibits A 1-A 5.

16. Since March 11, 1958, plaintiff has continued to publish and sell its copyrighted educational works. All copies thereof printed by plaintiff or under his authority or license have had affixed thereto proper notice of said copyright

and have been published in strict conformity with the provisions of the laws relating to copyrights.

17. Since March 11, 1958, plaintiff has been and still is the sole proprietor of all right, title and interest in and to the copyrights in said educational works, explanations, instructions and progress testing sheets with relation thereto.

18. On March 11, 1958, plaintiff added its said educational works in the form of various flash card sets to its aforesaid line of educational games and materials designed and marketed for use by children in the home.

19. Plaintiff incurred substantial expense in the creation and development of said flash card sets and in the promotion and advertising to establish a market for said products.

20. Subsequent to plaintiff's creation and development of its flash card sets and of a market for said products, and in an effort to deprive plaintiff of and to appropriate for itself the financial reward for plaintiff's authorship of these educational works, defendant Milton Bradley Company prior to March 1959 decided to, and did, copy plaintiff's flash card sets including the explanations, instructions and progress testing sheets with relation thereto for its own benefit and enrichment.

21. Commencing in 1953 and continuing to date, defendant Milton Bradley manufactured two flash card sets which were designated by defendants' witnesses as double value arithmetic flash cards; one set of these cards has addition problems on one side of the card and subtraction problems on the reverse side, with multiplication and division problems in like manner in the second set; said sets do not contain the same problems or instructions of the type originated by plaintiff and contain no problem numbers or testing sheets.

22. Defendant Milton Bradley Company used neither its own double value sets nor common source material in the production of the accused sets.

23. Commencing in 1957 and continuing to date defendant Milton Bradley Company manufactured Alphabet Picture Flash Cards such as plaintiff's exhibit 63.

24. Defendant Milton Bradley Company used neither its own Alphabet Flash Card sets nor common source material in the production of the accused alphabet flash card sets.

25. Defendant Milton Bradley Company photographed each of plaintiff's individual flash cards, photographically reduced plaintiff's testing sheets, copied and adopted as its own the problem numbers and sequence arrangement of plaintiff's flash cards and copied substantially the instructions and directions from plaintiff's works.

26. Defendant Milton Bradley Company copied the style, arrangement, sequence, plan of compilation and expression of plaintiff's original educational works.

27. Defendant Milton Bradley Company began to actively promote the sale of flash card sets copied from plaintiff's original works at the Toy Fair in New York City during the period March 9-14, 1959.

28. One of defendant's explanations for photographing plaintiff's original works and the copying of the style, arrangement, sequence, plan of compilation and expression thereof was that it was in a hurry to present its competitive flash cards set at said Toy Fair on March 9, 1959; another was that it was cheaper and another that it thought it had the right to copy.

29. Defendant Milton Bradley presented its infringing flash card sets at said Toy Fair on March 9, 1959, which sets were selected by the two largest wholesale buying groups, Toy Guidance Council and March of Toys, for inclusion in their catalogs.

30. Defendant Milton Bradley Company finished its first production runs of the accused flash card sets on March 21, 1959, and thereafter did print, publish and vend, and did actively induce and encourage others to publish and vend, its infringing flash card sets which it had plagiarized from flash card sets created by plaintiff.

31. Subsequent to plaintiff's creation and development of its flash card sets and of a market for said products, defendant A. C. McClurg & Company published and vended, and actively induced and encouraged others to publish and vend infringing flash card sets together with explanations, instructions and progress testing sheets with relation thereto which had previously, beginning in or about March 1959, been plagiarized from plaintiff's flash card sets by defendant Milton Bradley Company.

32. In a further effort to deprive plaintiff of the financial reward for its authorship of its flash card sets and to invade the market which it had created, defendants also published and used material photographed from plaintiff's flash card sets in its own catalogs and for the advertising and promotion of those flash card sets copied by defendant Milton Bradley Company and subsequently published and vended by both defendants.

33. Defendants used their established and dominant positions in the children's game and educational materials industry to persuade and induce other wholesalers and customers to purchase and resell flash card sets copied from plaintiff's copyrighted educational works, and printed, published and sold by defendants.

34. Defendant's plagiarism of plaintiff's flash card sets was wilful and deliberate and for the purpose of invading plaintiff's market for flash card sets designed especially for use by school children in the home.

35. Defendants have and are presently printing, pub-

lishing and vending within the Northern District of Illinois and elsewhere throughout the United States flash cards sets of the type exemplified by plaintiff's exhibits 3, 6, 9, 12, 15, 74-78, all of which sets are copied from the flash card sets originated by plaintiff.

36. As a result of defendant's printing, publishing and vending of flash card sets, and promotional and advertising materials, plagiarized from plaintiff's flash card sets, plaintiff, its business and its good will have been and are continuing to be irreparably damaged.

37. As a result of defendants' printing, publishing and vending of flash card sets, and promotional and advertising materials, plagiarized from plaintiff's flash card sets, plaintiff has lost sales and dealers; and plaintiff has been greatly and irreparably damaged and will continue to be so damaged unless defendants are restrained by this Court.

38. Defendants have profited and enriched themselves by reason of their printing, publishing and vending of the aforesaid infringing flash card sets and promotional and advertising materials plagiarized from flash card sets originated by plaintiff, and have thereby misappropriated the benefit of plaintiff's creativeness in its original work.

Additional findings of fact applicable to Count II of the complaint, as amended:

39. For a second and separate cause of action against defendants, plaintiff in Count II of its complaint, as amended, charged defendants with unfair competition and unfair business practices in the several ways and by the several means set forth in Count II of the complaint, as amended, by reason of which plaintiff sought injunction and damages against each of defendants.

40. The proof received in the trial fails to prove the allegations set forth in Count II to the extent necessary to sustain the charges of unfair competition or unfair business

practices or either of them against the defendants or either of them. The evidence failed adequately to prove confusion or likelihood of confusion of defendants' products with those of the plaintiff and failed adequately to prove fraud or misrepresentation as to source of the products involved and failed adequately to prove conspiracy between defendants or between either defendant and anyone else to usurp plaintiff's market.

41. Plaintiff has not met its burden of proof to show that any confusion has resulted by reason of the sale of flash card sets manufactured by defendant Milton Bradley Company, as exemplified by plaintiff's exhibits 3, 6, 9, 12 and 15.

42. Plaintiff has not met its burden of proof to show that there is any likelihood of confusion by reason of the sale of flash card sets manufactured by defendant Milton Bradley Company, as exemplified by plaintiff's exhibits 3, 6, 9, 12 and 15.

43. Plaintiff has not met its burden of proof to show that any fraud or misrepresentation as to source resulted by reason of the sale of flash card sets manufactured by the defendant Milton Bradley Company, as exemplified by plaintiff's exhibits 3, 6, 9, 12 and 15.

44. There is insufficient evidence to show that any unfair trade practices arose by reason of any newspaper or magazine advertising or that the defendants, or either of them, used tear sheets, trade directories, or trade catalogs in an unlawful manner, or in any manner, as to lead, or tend to lead, to confusion of source or confusion of goods.

45. There is insufficient evidence to show that the salesmen of Milton Bradley Company or of A. C. McClurg & Company engaged in any wrongful trade solicitation. Defendants' salesmen were selling the infringing flash card sets of Milton Bradley Company, as exemplified by plain-

tiff's exhibits 3, 6, 9, 12 and 15, on their own merits and upon the good business reputation of Milton Bradley Company.

46. The evidence shows that the defendant Milton Bradley Company used its own good will founded on a long history of dependable service to its customers and also to its business associates and friendships built up over the years to merchandise and sell its infringing flash card sets, as exemplified by plaintiff's exhibits 3, 6, 9, 12 and 15.

47. The defendant Milton Bradley Company did not commence to proclaim its materials as having "double value" subsequent to plaintiff's introduction of plaintiff's flash card sets in March 1958. Defendant Milton Bradley Company had used the expression "double value" as early as 1953.

48. The preponderance of the evidence fails to show that defendants exerted pressure on accounts with promises of more extensive newspaper and television advertising of defendant Milton Bradley Company's flash card sets.

49. The evidence was insufficient to show by its greater weight that defendants intimidated accounts by leading them to believe that defendant Milton Bradley Company would not sell others of their products to such accounts unless such accounts purchased Milton Bradley Company's flash card sets and stopped buying plaintiff's flash card sets.

50. In its amended complaint, plaintiff charged that defendants conspired to forestall and prevent the selection and approval by the Toy Guidance Council of plaintiff's flash card sets for publication in the Toy Guidance Council catalog and that at the connivance of defendant A. C. McClurg & Company, members or participating wholesalers in the council were influenced to vote for the selection and approval of the flash card sets of defendant Milton Bradley

Company and reject the flash card sets of the plaintiff. There is insufficient evidence to support the allegations of conspiracy and connivance or the use of any influence whatsoever on the part of defendant A. C. McClurg & Company upon other members or participating wholesalers in the Toy Guidance Council.

51. Plaintiff has failed to prove that defendants, or either of them, have in any respect, or in any manner, competed unfairly with plaintiff or engaged in any unfair business practice as charged in Count II of the complaint, as amended.

52. The equities in the cause of action of Count II are with the defendants.

Fred L. Wham,
Senior United States District Judge.

December 8, 1961.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction over the parties and the subject matter as set forth in Count I and Count II of the complaint, as amended.

2. Under the law and greater weight of the evidence the plaintiff is entitled to succeed and to the decision of this Court under Count I of the complaint, as amended, and the defendant is entitled to succeed under Count II of the complaint, as amended, and to the dismissal of said Count II for insufficient evidence to sustain.

3. The equities in the cause of action stated in said Count I are with the plaintiff.

4. Plaintiff is the author of several educational works for children in the form of flash cards, and of explanations, instructions and progress testing sheets with relation thereto, which are identified in the record as plain-

tiff's exhibits 2, 5, 8, 11 and 14 and said educational works are copyrightable subject matter under the laws of the United States.

5. Plaintiff has complied with the Copyright Laws of the United States and is the owner of valid and subsisting copyrights evidenced by Certificates of Registration, Nos. A-375788, A-383869, A-383868, A-383870 and A-393636, which are good and valid in law.

6. Plaintiff is entitled to the exclusive right to print, reprint, publish, copy, and vend its copyrighted educational works, and to all other rights and privileges under the law governing copyrights.

7. Defendants, Milton Bradley Company and A. C. McClurg & Company, have infringed each and all of said copyrights by printing, publishing and vending within the United States and elsewhere flash card sets including explanations, instructions and progress testing sheets with relation thereto, and by printing and publishing promotional and advertising material relating to flash card sets, all of which were copied from plaintiff's copyrighted educational works.

8. Defendants' infringement has caused irreparable damage to plaintiff and has unjustly enriched defendants and will continue to do so unless restrained.

9. Plaintiff is entitled to judgment on Count I of its complaint for infringement of copyrights as follows:

(1) Defendants, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with defendants, whether acting directly or indirectly, shall be perpetually enjoined and restrained from infringing plaintiff's copyrights as evidenced by Certificates of Registration Nos. A-375788, A-383869, A-383868, A-383870 and A-393636; from photographing any portions of plaintiff's copyrighted

flash card sets and using the photographs in the production of other flash card sets; from copying the style, arrangement, sequence, plan of compilation and/or mode of expression of plaintiff's copyrighted flash cards, explanations, instructions, or progress testing sheets; and from printing, reprinting, publishing, copying and/or vending said copyrighted works or any colorable imitations thereof.

(2) Defendants shall produce and deliver up on oath to the Court for the destruction thereof, all of the infringing copies of said copyrighted flash card sets as well as all plates, type, molds, matrices, or other means for making such infringing copies, which are currently in the possession and control of defendants or their officers, agents, servants, employees, attorneys, and those in active concert or participation with the defendants.

(3) Defendants will be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendants' infringement of plaintiff's copyrights and to account and pay over to plaintiff all of the gains, profits and advantages derived by defendants from their infringement of plaintiff's copyrights. Plaintiff is entitled to a separate accounting to determine and assess the amounts of such damages and profits in accordance with the provisions of the Copyright Laws governing such relief.

(4) Defendants shall reimburse plaintiff for plaintiff's costs, disbursements, and reasonable attorneys' fees attributable to Count I of the complaint, as amended.

10. The evidence fails to sustain the charges in Count II of the complaint, as amended, that the defendants or either of them has competed unfairly with plaintiff or engaged in any unfair business practice.

11. The equities in the cause of action of Count II are with the defendants.

12. Defendants are entitled to judgment dismissing Count II of the complaint, as amended, and to recover from plaintiff the costs attributable to that count.

Fred L. Wham,
Senior United States District Judge.

Dated:
December 8, 1961.

APPENDIX E.

Pertinent Excerpt From National Comics Publications, Inc. v. Fawcett Publications, 191 F. 2d 594, 602-603 (2 Cir. 1951):

Next is the question as to how far the notices must exactly conform to those which § 19 prescribes. It had been decided before § 21 was passed that, if the notice affixed carried an earlier date than the true one, the error did not "forfeit" the copyright, although the law required the notice to state the true year; and that ruling has been followed later. The rationale of these decisions, and their avowed justification, is that, since the purpose of the notice is to advise the public of the "proprietor's" claim, any notice will serve which does in fact advise it that there is a "proprietor" who does claim copyright, provided the notice does not affirmatively mislead. It is true that § 21 would not protect imperfect notices which appeared upon more than "particular copies"; nevertheless it would be absurd to construe it as limiting any latitude that the preceding law had allowed to a notice not strictly in accord with § 19. Therefore we hold that any notice is sufficient which gives the substance of what is prescribed in § 19. As applied to the alternative in § 19 of the letter "C," in place of "Copyright," there are indeed decisions to the contrary of this. The Eighth Circuit in *Advertisers Exchange* v. *Anderson*, 144 F. 2d 907, and Judge Barksdale in *Deward & Rich* v. *Bristol Savings & Loan Corp.*, D. C., 34 F. Supp. 345—affirmed without comment on this point in 120 F. 2d 537—held that it "forfeited" a copyright to affix the letter "C" instead of the word "Copyright" if the "work" was not within subsections (f) to (k) of

§ 5. It is not altogether plain to us why such a notice should not have been held sufficient under the doctrine we have just mentioned; but the actual holding in these decisions need not trouble us, for in the case at bar the "strips" were "pictorial illustrations," and within subsection (k) of § 5. The "proprietor" of such "works" has a choice between using the word "Copyright" and the letter "C," and either will serve.

Last is the question whether the copyrights on the "strips" appearing in Numbers 5 and 6 of the magazine, "Superman," were "forfeited" because the notice gave the corporation, Superman, Inc., as the name of the "proprietor," instead of "Detective," the "proprietor" in fact. Once more, § 21 did not excuse this, if the notice was insufficient, because an issue of "Superman" covered more than "particular copies." There is, however, no necessity to invoke that section, for we think that the notice was sufficient because of the relation of Superman, Inc., to "Detective." It was a corporation having the same officers, directors and shareholders as "Detective," and a subsidiary, fairly described as its "promotional agency." "Detective" had appointed it in January, 1940, as its "exclusive agent to exploit 'Superman' the trade-marks and copyrights and/or other rights therein, in any manner whatsoever," although it had confined the subsidiary to the exploitation of "Superman." It is true that the agreement did not authorize Superman, Inc., to take out copyrights; and we agree that, if Superman, Inc., had, like "McClure," been a corporation, having an independent will, and owned by shareholders who had interests separate from "Detective's," we should not be justified in holding that the mistake fell within the doctrine of the decisions we have mentioned. Since, however, the interests of the two corporations were precisely the same, we think that a notice was sufficient which used the dummy's name as

"proprietor." Anyone who should act in reliance upon the proprietorship of Superman, Inc., would not find himself in any different position because it turned out that that corporation was only a dummy; certainly "Detective" could not for that reason have escaped any liability. We are unwilling to allow a barefaced infringer to invoke an innocent deviation from the letter that could not in the slightest degree have prejudiced him or the public. *Wildman* v. *New York Times Co.*, D.C., 42 F. Supp. 412, held that § 21 did not excuse mistakes of law; and, although for the reasons given the section did not apply as to these issues of "Superman," the same argument may be made to confute the latitude we are allowing to the notice. If so, we answer that although the doctrine does persist in some circumstances that a mistake of law will not excuse, it is a principle more honored in the breach than in the observance, and that we are unwilling to introduce it here. It is true that in our decision in *Fleischer Studios, Inc.* v. *Ralph A. Freundlich, Inc.*, 2 Cir., 73 F. 2d 276, the only mistake in the "proprietor's" name was the omission of the suffix, "Inc."; nevertheless, the reason for our disregarding that mistake was because it was trivial, and surely the measure of triviality is not whether on its face the mistake seems important, but whether it is in fact.

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No. 968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

MILTON BRADLEY COMPANY and
A. C. McCLURG & COMPANY,
Petitioners,

vs.

THE GELLES-WIDMER COMPANY,
Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The oral decision, findings of fact and conclusions of law (App. D of Petition) are reported at 132 U.S.P.Q. 30. The opinion of the Court of Appeals for the Seventh Circuit (App. B of Petition) is reported at 313 F.2d 143.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether a valid copyright is forfeited by publication with notice of copyright in the trade name of an alter ego

having the same officers, employees, agents, directors and shareholders, whose respective interests are the same as the corporation in whose name the copyright was secured.

STATEMENT

Petitioners ask this Court to bring before it for review a decision of the Court of Appeals for the Seventh Circuit affirming a judgment of the District Court for the Northern District of Illinois holding respondent's copyrights valid and wilfully infringed by petitioners.

The Petition does not question the concurrent holdings of the Courts below that petitioners wilfully infringed respondent's valid copyrights. The Court of Appeals' opinion (Appendix B to Petition, page vi) points out that:

> "The trial in the District Court extended over two weeks. Eight witnesses testified before the Court and others by deposition. Each party introduced over one hundred physical and documentary exhibits. After the filing of briefs and full oral argument, the trial Court entered detailed findings of fact and conclusions of law."

The District Court's findings[1] are briefly summarized in the Court of Appeals opinion as follows (Appendix B to Petition, page vi):

> ". . . plaintiff was the author of the copyrighted educational works comprising the five individual sets of flash cards; plaintiff's educational works comprise copyrightable subject matter; defendant Bradley infringed plaintiff's copyrights by photographing plain-

[1] Appendix D to the Petition, pages xvi to xxii.

> tiff's card sets, by copying and adapting plaintiff's sequence arrangements and by substantially plagiarizing plaintiff's instructions and directions, and that defendant's copying and plagiarizing was wilful and deliberate."

The sole question raised by the Petition is whether the sometimes use of the tradename of a corporate adjunct or *alter ego* of the respondent, in whose name the copyright was secured, was a sufficient compliance with Title 17 U.S.C., Section 19 and did not forfeit the copyrights.

This issue is stated in the Court of Appeals' opinion as follows (Appendix B to Petition p. ix):

> "Defendants urge the copyrights in suit are invalid because plaintiff permitted the use of an improper copyright notice by School Aid Products Company on a small set of flash cards directed through another market distribution."

The Court of Appeals also noted with approval the District Court's findings of fact[2] that "School Aid Products Company had the same officers, employees, agents, directors and shareholders whose respective interests are the same as those of the officers, employees, agents, directors and shareholders" of respondent and that "The interests of the two companies were precisely the same." In addition it noted that petitioners "were in no way prejudiced by any reliance on the notice in the small sets" and that the director of research of petitioner Milton Bradley admitted that he had before him respondent's educational works having a notice containing respondent's name throughout the year when he was "developing" the infringing works (Appendix B to Petition, p. ix).

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[2] Findings 14 and 15, Appendix D to the Petition, page xviii).

Following the decision in *National Comics Publications, Inc.* v. *Fawcett Publications, Inc.*, 2 Cir. 1951, 191 F.2d 594, the Court of Appeals below held that notices using the name School Aid Products did not invalidate the copyright.

REASONS FOR DENYING THE WRIT

There are no considerations which warrant review by this Court of the question presented in this case. The issue, at best, is a narrow one which has uniformly been decided contrary to petitioners' position in various of the federal courts which have had occasion to consider it since the enactment of the first Copyright Law. Petitioners' main complaint seems to be that the courts below decided the issue on the basis of, and in conformity with, a decision of the Court of Appeals for the Second Circuit. While petitioners are desperate to rid themselves of the consequences of their wilful infringement and brazen plagiarism and find the law of the Second Circuit not to their liking, this hardly presents a basis for invoking this Court's powers of review. It is the existence of conflicts within the Circuits, not the uniformity, which calls for this Court's intervention. Moreover, the issue does not broadly concern the interpretation or administration of the copyright statutes nor involve the basis upon which authors and artists are protected against plagiarism of their works.

Petitioners attempt to support their petition by misstating the "Question Presented". Petitioners erroneously ask whether a court may "excuse compliance with the provisions of 17 U.S.C. §§ 10, 19". The findings of fact and conclusions of law entered by the District Court and the opinion of the Court of Appeals clearly demonstrate that these courts did not "excuse compliance" with any-

thing. Both courts specifically held that respondent had complied with all of the requirements of the Copyright Statute including the notice requirements set forth in Sections 10 and 19.[3]

The holdings of the District Court and of the Court of Appeals are in accord with the decisions of other federal courts. All the decisions on the issue have uniformly held that the requirements of the statute are met when the copyright notice is in the trade name of an adjunct of the party in whose name the copyright was secured. No decision to the contrary has been found or cited.

Petitioners err in their assertion that the decision below is in conflict with previous decisions of this Court, and of courts of other circuits, and with the broad purpose of the Copyright Law. Such assertion is apparently predicated on petitioners' misstatement of the Question Presented. The cited authorities merely hold that there must be substantial compliance with the requirements of the statute. The legislative history with which petitioners preface their argument demonstrates only that the statutory requirements have not been relaxed. The decision below did not take exception to either of these propositions.

I.

The Decision Below Is Clearly Correct And Is Not In Conflict With Decisions Of This Court.

The Court below held that, under the circumstances of this case, the publication of the works with notice of copyright in the name of School Aid Products Company did not invalidate or work a forfeiture of the copyrights secured in respondent's name. Commenting on the findings

[3] Finding 11, Conclusion 5, Appendix D to the Petition; Opinion, Appendix B to the Petition, p. ix.

of the District Court that School Aid Products Company had the same officers, employees, agents, directors and shareholders, whose respective interests were the same as those of respondent, the Court of Appeals said (App. B to Petition, p. ix):

> "The interests of the two companies were precisely the same. (Petitioners) were in no way prejudiced by any reliance on the notice on the small sets."

In reaching this decision, the Court of Appeals followed the holding in *National Comics Publications, Inc.* v. *Fawcett Publications, Inc.*, 2 Cir. 1951, 191 F.2d 594. In that case, as here, the copyrighted works had been published under the tradename of a corporate adjunct, the interests of the two corporations being identical. As in the present case, the infringer there had complete knowledge of the copyright and of the proprietor before commencing the plagiarism. Speaking through Judge Learned Hand, the 2nd Circuit Court said:

> "Since, however, the interests of the two corporations were precisely the same, we think that a notice was sufficient which used the dummy's name as proprietor. . . . We are unwilling to allow a bare-faced infringer to invoke an innocent deviation from the letter that could not in the slightest degree have prejudiced him or the public."

The decision of the Court of Appeals in the present case is also in accord with *Doran* v. *Sunset House Distributing Corp.*, D.C.S.D. Cal., 1961, 197 F. Supp. 940, *aff'd.* 9 Cir., 1962, 304 F.2d 251, where it was held that Doran, one of the copyright proprietors, did not forfeit the copyright by causing her work to be published under "Plastic Personalities", the former trade name of a company of which she was sole owner.

On all fours with the instant case is *B & B Auto Supply, Inc.* v. *Plesser*, DC SD N.Y., 1962, 205 F. Supp. 36. In that case, the Court held that B & B's copyright on a trade catalog was not forfeited because of the fact that the same catalog had also been published by Denmay Merchandising Company, a trade name or style which B & B used, and by Major Products, Inc., a corporation owned and controlled by the same persons who owned and managed B & B. The Court said in part at pages 39, 40:

> "Here, each of such companies constituted merely an *alter ego* of B & B, with the same officers, directors and shareholders as B & B. The fact that the catalog was also published with a notice of copyright naming each of such companies as the copyright proprietor is not fatal and will not cause a forfeiture of B & B's copyright where, as in this case, the companies were identical to the actual copyright proprietor from the standpoint of ownership and control."

The following decisions are to the same effect and indicate that the law applied by the Court of Appeals in the instant case has been uniformly applied since at least as early as 1894: *Dan Kasoff, Inc.*, v. *Gresco Jewelry Co.*, DCSD N.Y., 1962, 204 F. Supp. 694, *aff'd.* 2 Cir., 1962, 308 F. 2d 806; *Trifari, Krussman & Fishel, Inc.* v. *B. Steinberg-Kaslo Co.*, DCSD N.Y., 1956, 144 F. Supp. 577; *Hollywood Jewelry Mfg. Co.* v. *Dushkin*, DCSD N.Y., 1955, 136 F. Supp. 738; *Werckmeister* v. *Springer Lithographing Co.*, S.D. N.Y., 1894, 63 Fed. 808; *Woodman* v. *Lydiard-Peterson Co.*, D.C. Minn., 1912, 192 Fed. 67; *Harry Alter Co.* v. *Graves Refrigerations, Inc.*, DCND Ga. 1951, 101 F. Supp. 703. The *National Comics* decision which the 7th Circuit followed in the case at bar, was anticipated in *Fleischer Studios* v. *Ralph A. Freundlich, Inc.*, 2 Cir. 1934, 73 F.2d 276. It was there held that a copyright notice in other than the corporate name in

which the copyright was secured did not forfeit the copyright. And in that case certiorari to the Supreme Court of the United States was denied: 1935, 294 U.S. 717.

It is significant to note that petitioners do not claim that they were in any way misled or prejudiced as a result of the publication of some of the works under the School Aid Products trade name. Nor could they. Milton Bradley's director of research and development, Taft, admitted that he had the copyrighted works published by respondent before him during the time in which he "developed" the infringing sets, and that he had observed the copyright notice.[4] Taft further admitted that he photographed respondent's flash cards, notwithstanding the copyright notice, because he was in a hurry to begin competing with respondent. It was on the basis of these and similar admissions that the infringement in this action was found to be wilful and deliberate.[5]

Petitioners err in their assertion that the decision in this case conflicts with previous decisions of this Court. Rather the decisions cited by petitioners compel the result reached in this case.

Mifflin v. *White*, 1903, 190 U.S. 260 involved Holmes' *Professor at the Breakfast Table* which was first published serially in the Atlantic Monthly. The question presented to the Court was whether the publication of the last two parts of that work in the magazine which as a whole was copyrighted by its publishers, Tichenor & Fields, preserved Holmes' copyright on those two parts. The Court held that it did not, saying in part at page 263:

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[4] Appendix to Brief For Defendants, etc. p. 202-203, 351.

[5] Appendix to Brief for Defendants, etc. p. 190-197; Finding of Fact 28, 34 (App. D to Petition).

"The entry of the Atlantic Monthly, by Tichenor & Fields was evidently not intended for the protection of the author of each article therein appearing, but for their own protection, and to prevent the republication of the December number of the Atlantic Monthly."

While holding that the publication of an article without copyright notice in a magazine, which as a whole was copyrighted by its publishers, barred the subsequent claim of copyright by the author of the article, the Court did recognize that a different question would have been presented had Holmes authorized the publishers of Atlantic Monthly to copyright the article in their name. In the course of its opinion, the Court noted that "had the copyright been entered by Tichenor & Fields as agents of Dr. Holmes, it is possible that it might have been sustained. . . ." (190 U.S. at 263). The Court said, ". . . the person claiming a monopoly of publication shall pursue, in substance at least, the statutory method of securing it." (190 U.S. at 264).

The suggestion in *Mifflin* v. *White* that the copyrighting of a work by an agent in his own name with the authority of the principal is proper under the Copyright Law, is in accord with the result reached in the case at bar, as well as the decisions of other courts above referred to.

Similarly *Mifflin* v. *Dutton*, 1903, 190 U.S. 265, demonstrates the lack of basis for claiming the existence of conflict. In that case, Harriet Beecher Stowe had copyrighted 13 parts of *The Minister's Wooing*, and then contracted for publication by Atlantic Monthly magazine, such publication of each part being without any notice of copyright. As in *Mifflin* v. *White*, the sole question was whether publication by the magazine with its own notice of copyright as to the whole magazine preserved Mrs.

Stowe's copyright as to the part of her work being published serially. Under the statute then in force (since amended) this Court answered that question negatively, as it had in *Mifflin* v. *White*. There was no showing in *Mifflin* v. *Dutton* that Mrs. Stowe had authorized the magazine publishers to copyright her work, nor was there any showing of any identity of interest of any kind between Mrs. Stowe and the Atlantic Monthly publishers. Accordingly, there was no occasion to consider what the result would be if Mrs. Stowe and the magazine publishers had been, in reality, the *alter ego* of each other having identical direction, control and beneficial interests.

In *Thompson* v. *Hubbard*, 1889, 131 U.S. 123, the Court considered the effect of publication of a copyrighted work under a notice which in some instances failed to state either the date of the copyright or any proprietor thereof, and in other instances included the date but failed to designate a proprietor. The Court held that this was a failure to comply with the notice requirements of the Copyright Law and a dedication of the work to the public.

Even more inapposite is *De Jonge & Co.* v. *Breuker & Kessler Co.*, 1914, 235 U.S. 33. In that case, the Court had before it a copyright on a single artistic design. The design was printed repetitively on a sheet of wrapping paper, but the copyright notice appeared on each sheet only once as to one of the repeated designs. Since the proprietor had elected to copyright only the single design rather than the whole sheet with the design repeated on it, the repetition of the copyrighted design on the sheet without repeating the copyright notice acted as an abandonment of the copyright.

II.

There Is No Conflict Among The Circuits.

The decisions of the Court below and of the Court of Appeals for the Second Circuit in *National Comics* are not in conflict with decisions of other circuits. Petitioners' assertion that such conflict exists is erroneous.

Indeed, petitioners concede that no real or actual conflict exists between circuits, claiming only (Pet. p. 15) that the alleged conflict relates to a "philosophical difference in approach taken by the circuits." Even in this, petitioner errs.

Thus in *Egner* v. *E. C. Schirmer Music Co.*, 1 Cir., 1943, 139 F. 2d 398, the Court was faced with a situation wherein the work on which copyright was being asserted had previously been published without any copyright notice at all affixed thereto. The Court there correctly held that the prior publication without notice was a dedication to the public and invalidated the copyright.

In *Deward and Rich* v. *Bristol Savings & Loan Corp.*, 4 Cir., 1941, 120 F. 2d 537, the copyright notice was so inconspicuous as to be illegible to the unaided eye. Taking the view that the illegible notice was no notice at all, the Court held that there was publication without copyright notice of any kind and therefore the copyright had been abandoned.

Booth v. *Haggard*, 8 Cir., 1950, 184 F. 2d 470, involved the failure to place a copyright notice on the title page or the next following page of a book. *Advertisers Exchange, Inc.* v. *Anderson*, 8 Cir., 1944, 144 F. 2d 907, is concerned with the use of the letter "C" inclosed in a circle on a book of illustrations as prohibited by the prior statute (since amended in this regard).

Not one of the cases cited by petitioners in support of their assertion that there is a conflict among circuits even relates to the designation of the copyright proprietor in the statutory notice of copyright. The "approach" of these courts to the respective questions before them is simply that there must be substantial compliance with the statutory requirements. This differs neither "philosophically" nor in fact with the decision of the Court below.

CONCLUSION

Review or writ of certiorari is not a matter of right.* Where review is sought on the basis of an alleged conflict, there must in fact be a conflict, a real and embarrassing conflict. *Layne & Bowler Corp.* v. *Western Well Works, et al.*, 1923, 261 U.S. 387. No such real and actual conflict here exists and this is conceded by petitioners who only assert that there is a "philosophical difference" in "approach".

As shown, no conflict, direct or indirect, actually exists as to philosophical differences or approaches, general issues, or otherwise between the decisions of the 7th Circuit in this case and the 2nd Circuit in *National Comics* on the one hand, and the decisions of this Court or the Courts of Appeal of the 1st, 4th and 8th Circuits cited by petitioners, on the other hand. No public question is involved, there is no conflict among the circuits, nor between any circuit and this Court, and there is no confusion in the administration of the Copyright Act.

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* Rule 190, Revised Rules of the Supreme Court of the United States.

There is no basis on which petitioners' petition can be granted and, accordingly, we pray that it be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 968

MILTON BRADLEY COMPANY AND A. C. McCLURG & COMPANY,

Petitioners,

vs.

THE GELLES-WIDMER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY BRIEF.

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This reply is made necessary by respondent's spurious restatement of the question presented. It will be understood that respondent's arguments not specifically discussed herein were anticipated and adequately covered in the petition.

We first note that the stricture[1] which respondent would apply to petitioners' "Question Presented" is unwarranted. That question has not been misstated; neither have petitioners erroneously asked whether a court may "excuse compliance with the provisions of 17 U. S. C. §§ 10, 19." This is precisely what the courts below did when

1. Respondent's Brief, p. 4.

they approved and accepted the deliberate use in the copyright notice upon thousands of copies of the copyrighted work of the *name of a non-proprietor* in the face of the requirements of Sections 10 and 19 that a prescribed notice "accompanied by the name of the copyright proprietor" shall be affixed to "each" copy of the copyrighted work "published or offered for sale."

Respondent argues that the actual copyright proprietor may deliberately use, or permit the use of, the names of non-proprietors in the prescribed notice and still be in full compliance with the provisions of Sections 10 and 19. Respondent thus argues for the virtual nullification of these sections, something which Congress has for many years consistently refused to do.

If Sections 10 and 19 stand nullified, as respondent in effect contends, then, indeed, petitioners have "misstated" the question, for if compliance is not required, it follows that no excuse was needed for respondent's non-compliance. But if these provisions are still in force and effect, as no doubt they are, then compliance with them is required, as demanded by 17 U. S. C. § 1; and when, as here, the copyright proprietor, *i.e.* respondent, has admittedly permitted thousands of the copyrighted works to be published and sold with a copyright notice deliberately misstating the name of the copyright proprietor, then respondent has either lost its copyrights or it must provide a valid and sufficient excuse for its non-compliance. The basis for the present petition is that the excuse offered by respondent and accepted by the court below was neither valid nor sufficient. Surely respondent is guilty both of quibbling and of begging the issue when it seeks refuge in the very conclusion of the court below which the instant petition challenges as a matter of law.

The chief trouble with respondent's attempted restate-

ment of the question presented is that there is no basis whatever for respondent's assertion that the questioned notice was in the "tradename of an adjunct of the party in whose name the copyright was secured."[2] This contention is made for the first time in this Court, and respondent signally fails to cite any evidence in the record that "School Aids Products Co." is a tradename either of respondent or of any adjunct of respondent. On the contrary, this name is the full corporate title of a separate and distinct legal entity.[3]

Moreover, neither the Second Circuit, in the *National Comics* case, nor the court below, in the instant case, rested their decisions here questioned on the so-called permissible tradename principle. It is one thing to hold that the statutory requirements are met by the use of the tradename by which the copyright proprietor is known, as was the case in *Doran* v. *Sunset House Distributing Corp.*, 197 F. Supp. 940 (S. D. Cal. 1961)[4] and quite a different thing to hold, as was

2. Respondent's Brief, p. 5.

3. It makes no difference whether the separate corporation is described as an "adjunct" of respondent or as a sister corporation, which was the expression used in the court below. This Court has said in *Schenley Distillers Corp.* v. *United States*, 326 U. S. 432, 437:

> "... One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public."

4. As pointed out in *Werckmeister* v. *Springer Lithographing Co.*, 63 Fed. 808, 810 (S. D. N. Y. 1894), the tradename principle is grounded in the common law: "if persons trade or carry on business under a name, style, or firm, whatever may be done by them under that name is as valid as if real names had been used." Other tradename cases relied on by respondent (Brief p. 7) which similarly have no relevancy here are *Dan Kasoff, Inc.* v. *Gresco Jewelry Co.*, 204 F. Supp. 694 (S. D. N. Y. 1962); *Trifari Krussman & Fishel, Inc.* v. *B. Steinberg-Kaslo Co.*, 144 F. Supp. 577 (S. D. N. Y. 1956), and *Hollywood Jewelry Mfg. Co., Inc.* v. *Dushkin*, 136 F. Supp. 738 (S. D. N. Y. 1955).

held in *National Comics* and in the instant case, that the requirements are met by a notice in the name of a non-proprietor.[5]

Fleischer Studios, Inc. v. *Ralph A. Freundlich, Inc.*, 73 F. 2d 276 (2 Cir. 1934),[6] involved a notice where there was an innocent omission of the abbreviation "Inc." from the name of the copyright proprietor. If this decision anticipated the *National Comics* case, in any respect, it was only in the fact that both cases involved innocent variations,[7] whereas respondent's variation was deliberate and made for financial gain. *Harry Alter Co.* v. *Graves Refrigeration, Inc.*, 101 F. Supp. 703 (N. D. Ga. 1951),[8] involved a case of substantial compliance, and was decided on the authority of the *Fleischer Studios* case. These cases have no relevancy[9] in the case at bar, where there certainly was no effort to comply with the statute. Use of the name of a non-proprietor can by no stretch of the imagination be deemed an effort to comply with a provision requiring that the name of the proprietor be used.

Finally, it is noted that respondent's contentions that

5. *B & B Auto Supply, Inc.* v. *Plosser*, 205 F. Supp. 36 (S. D. N. Y. 1962) (Respondent's Brief, p. 7), involved the use of the name of a non-proprietor. The court in that case undoubtedly considered itself bound by *National Comics* as being the law of the circuit.

6. Respondent's Brief, pp. 7-8.

7. See 93 F. Supp. 349, where it appears that in *National Comics* there was an agreement between Detective Comics, Inc., and Superman, Inc., by virtue of which Superman, Inc., innocently assumed the right to use its name in the copyright notices and thereafter perfect the copyrights, a mistake which when discovered was immediately rectified by the parties.

8. Respondent's Brief, p. 7.

9. Respondent's reliance (Brief, p. 7) on *Woodman* v. *Lydiard-Peterson Co.*, 192 Fed. 67 (D. Minn. 1912), appears also to be misplaced. The notice in the copyrighted book in that case was admittedly proper and the question involved was whether the copyright covered a map included in the book.

Mifflin v. *White* and *Mifflin* v. *Dutton* compel the result reached in the instant case, are untenable.[10] In *Mifflin* v. *White*, this Court expressly *assumed that the Ticknor & Fields copyright was perfected with the authority of Dr. Holmes* and considered the effect of two different copyright notices and two different copyright proprietors for a single copyright. It is in the portion of the opinion dealing with this assumption where the principles applicable to the case at bar are found. And, contrary to respondent's contentions, Mrs. Stowe's copyrighted chapters in *Mifflin* v. *Dutton* were published in the *Atlantic Monthly* "in accordance with an arrangement with Mrs. Stowe" (190 U. S. 265) and there was identity of interest in the broad sense. Indeed, in the Circuit Court, Judge Colt considered the contention that "Ticknor & Fields were the agents of Mrs. Stowe" and specifically rejected as unsound the assertion that use of an agent's name in a copyright notice satisfied the statute (107 Fed. 710).

Conclusion.

In the instant case, petitioners have been found guilty of copyright infringement because the courts below found that the respondent's copyrighted flash cards protected such uncopyrightable matters as the basic arithmetical facts, notwithstanding that the alleged author protested: "Sir, I would never say that I created two plus two."[11] In these circumstances it is hardly appropriate for respondent to wax eloquent concerning petitioners' dislike for the decision below. There is more at stake in this case than the rights of respondent and petitioners. The law, in allowing the copyright privilege, has not failed to protect the rights of the public; on the contrary, it has safeguarded them.

10. Respondent's Brief, pp. 8-10.

11. Appendix to Brief for Defendants (7 Cir.) p. 111.

Thus, while patentees and copyright proprietors have rights, the public have rights also. "The rights of both should be upheld and enforced by an equally firm hand, wherever they come under judicial consideration." *Densmore* v. *Scofield*, 102 U. S. 375, 378. "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 158.

Respectfully submitted,

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